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No. 228

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The National Labor Relations Board prays that a writ of certiorari issue to review that part of the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on April 13, 1960, which denies enforcement of the reimbursement provisions of the Board's order.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, pp. 10–23, *infra*) and a supplemental opinion of the Court of Appeals entered May 17, 1960 (Appendix, pp. 23–24, *infra*) are not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 223a–243a, 210a–219a)[1] are reported at 122 NLRB 1324.

[1] "R" references are to the joint appendix to the briefs of the parties in the court below.

JURISDICTION

The decree of the Court of Appeals (Appendix, pp. 25–33, *infra*) was entered on May 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board as a remedy for a hiring arrangement between the employer and the union which unlawfully conditions employment upon union membership, may require that the employees be reimbursed for all dues and other monies which they paid to the union under that arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

STATEMENT

A. THE BOARD'S FINDINGS

Employment of operating engineers at the Morrisville, Pennsylvania plant of respondent American Bridge Division of the United States Steel Corporation is handled through the master mechanic on the job, a member of and designated by respondent Local 542, International Union of Operating Engineers, AFL-CIO. Although there was no formal contract between American Bridge and Local 542, American

Bridge, in accordance with its custom, generally followed and conformed to the terms of an area-wide contract in effect between Local 542 and various contractor associations in the same area (R. 225a; 123a–127a). This included compliance with the Union rule embodied in the contract that "[w]hen seven or more engineers are employed on any one project by one employer, a Master Mechanic [foreman for the engineers] shall be employed" (R. 225a; 157a, 125a, 127a). Designation of the master mechanic by Local 542 is both contemplated by the area-wide contract and required by the Local's by-law that "[a]ll master mechanics [are] to be selected by union and business agent in that district" (R. 224a; 154a, 196a).

When the American Bridge superintendent needed more operating engineers he informed the master mechanic who thereafter exercised complete control over the recruitment and selection of those to be employed (R. 224a; 95a, 119a). A reduction in force was accomplished in similar fashion with the master mechanic designating the specific individuals to be laid off (R. 224a; 96a–97a). In the exercise of his authority the master mechanic complied with Local 542 by-laws and the constitution of the International Union and secured employees exclusively from the hiring hall maintained by Local 542 (R. 224a, 226a; 93a–97a, 108a, 119a). The constitution requires, *inter alia*, that "Each member shall hire none but those in good standing with a Union having jurisdiction over the work done" (R. 173a). The by-laws require that full union members ("bookmen") shall have preference for jobs over "permit men," and also over

apprentice operators (R. 224a; 196a). The master mechanic, as a union member, is obligated under penalty of fine and expulsion to comply with the requirements of the constitution and by-laws (R. 224a; 178a).

Early in January 1957, the American Bridge superintendent requested the master mechanic to employ James Russell for a job opening (R. 228a; 115a–117a). Instead of hiring Russell, who, although a union member, had twice been involved in litigation in opposition to the union leadership (R. 230a, 40a–41a, 49a–51a), the master mechanic hired another operating engineer (R. 228a; 38a, 117a). Subsequently the union business agent expressed his opposition to the employment of Russell (R. 229a; 87a–88a), and on two other occasions the master mechanic failed to employ Russell on jobs, as he had been instructed (R. 229a–230a, 118a–120a, 94a–95a, 98a–99a). Russell was not put to work until March 26, 1957 (R. 230a; 42a).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that American Bridge and Local 542 had entered into an agreement or arrangement to operate under closed-shop conditions, and thereby violated Sections 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the Act. The Board found that the inevitable consequence of Local 542's powe to appoint the master mechanic with authority to hire and fire employees, which power was given with the knowledge and acquiescence of American Bridge, was to enable Local 542 to control

the employment of operating engineers in accordance with its policies favoring union members (R. 225a). The Board further concluded that the denial of employment to Russell was attributable to this discriminatory hiring system, and thus likewise proscribed by the Act (R. 231a).

The Board's order (R. 235a–241a, 243a–247a) directs the respondents to cease and desist from the unfair labor practices found, and from in any like or related manner interfering, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act. Affirmatively the Board's order requires respondents jointly and severally to reimburse the former and present employees of American Bridge for all fees, dues and other sums paid Local 542 in order to secure or retain employment with American Bridge under the illegal hiring arrangement, to make Russell whole, for any loss of wages incurred as a result of the discrimination against him, and to post appropriate notices.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, sitting *en banc*, sustained the Board's unfair labor practice findings, and granted enforcement of its order, except that portion requiring reimbursement of monies paid to the Union. Enforcement of the latter portion was denied upon the authority and the reasoning of the Court's earlier decision in *National Labor Relations Board* v. *American Dredging Company*, 276 F. 2d 286, petition for certiorari pending, No. 123, this Term (Appendix,

p. 18, *infra*).[2] In a supplemental decision, the Court, citing the intervening decision in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479, modified the Board's order so as to limit its coverage to a repetition of the same illegal practices by or against the identical parties involved in this particular proceeding (Appendix, pp. 23–24, *infra*).

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that monies paid by the employees to the union while subjected to those practices be repaid to them. The same question is presented in *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters*, Nos. 68 and 85, this Term, certiorari granted June 27, 1960. In addition, Board petitions for certiorari are pending in other cases involving the question, including *American Dredging Company*, relied on by the court below—Nos. 89, 120, 123, this Term. The instant petition is filed to preserve the Board's position on the issue in this case.

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[2] Judge Biggs dissented from the finding of a violation. However, he indicated that he would concur in the court's view respecting the inappropriateness of the reimbursement remedy (Appendix, pp. 22–23, *infra*).

CONCLUSION

For these reasons, the present petition should be granted, or, in the alternative, held in abeyance pending a decision on the question in Nos. 68 and 85.

Respectfully submitted.

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I authorize the filing of this petition for a writ of certiorari.

J. LEE RANKIN,
Solicitor General.

JULY 1960.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,011

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1960

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed April 13, 1960)

By GOODRICH, *Circuit Judge*.

The National Labor Relations Board in this case petitions for enforcement of an order made by it against both the employer United States Steel Corporation (American Bridge Division) and Local Union 542, International Union of Operating Engineers, AFL–CIO. There is no doubt about jurisdiction of the Board and the Court. The Board has found that the employer violated Sections 8(a) (1)

and (3) of the National Labor Relations Act[1] and that the union violated Sections 8(b)(1)(A) and (2) of the Act.[2] The complaint here was started by an employee named Russell who claimed to have been discriminated against in hiring procedures.

The facts are fully stated in the opinion of the Board, 122 N.L.R.B. No. 155. We will summarize them very briefly here. There is no formal contract between American Bridge Division of the United States Steel Corporation and Local 542. But it was shown that the provisions of the area-wide contract between Local 542 and various contractor associations in the area have been followed with regard to American Bridge's operations at U.S. Steel's Morrisville, Pennsylvania, plant.

One of the provisions of the area-wide contract requires the employer to employ a Master Mechanic whenever seven or more engineers are utilized on any one project. Hiring of operating engineers at the Morrisville plant was performed by the Master Mechanic (a union man) who is a "supervisor" within the meaning of Section 2(11) of the Act.[3] There is sufficient evidence in the record to support the Board's findings that (1) the Master Mechanic (except for two instances) exercised complete control over the selection of operating engineers to be employed, (2) the Master Mechanic secured employees exclusively from the hiring hall maintained by Local 542, and (3) the Master Mechanic was required by the constitution of the International Union and by the by-laws approved by the members of Local 542[4]

[1] 29 U.S.C.A. § 158(a) (1) and (3).

[2] 29 U.S.C.A. § 158(b)(1) (A) and (2).

[3] 29 U.S.C.A. § 152(11).

[4] The union contends that the proposed by-laws of Local 542 were never technically put into effect since Local 542 had no officers but was under the direct supervision of the Interna-

to hire only those in good standing with the union. Added to these findings is the fact that neither the employer nor the union suggested before the Board that any non-union men were employed by American Bridge at the Morrisville plant.

We think the Board was justified in concluding that, as a result of the Master Mechanic's dual capacity as agent for both American Bridge and Local 542, both employer and union were responsible for the hiring procedures employed. It was also justified in concluding that there existed a hiring arrangement which limited employment to union members in good standing with the union. Such a hiring arrangement has often been held to be a violation of the Act.[5]

As for Russell himself, the evidence shows that, on three occasions, he was denied employment for which he was qualified. Russell was a member of Local 542 who had been involved in disputes with officials of the Local over the manner in which they conducted union affairs. He contended, and the Board so found, that the union opposed his employment because of these disputes and that he was denied employment on the specific occasions as a result of the operation of the unlawful hiring arrangement.

The trial examiner who heard the testimony recommended dismissal of the entire complaint for lack

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tional. Even if we accept that contention, it does not follow that the by-laws are immaterial. A majority of the members of Local 542 approved the by-laws and, in light of the facts shown, the Board was entitled to conclude that the Master Mechanic and other members of Local 542 followed them whether or not the International recognized them as being in effect.

[5] See NLRB v. Philadelphia Iron Works, 211 F. 2d 937, 943 (3d Cir. 1954), and cases cited therein. See also NLRB v. Local 420, Plumbers, 239 F. 2d 327, 330 (3d Cir. 1956).

of evidence. But the majority of the Board, one member dissenting, reversed the trial examiner and held the testimony sufficient to uphold the charges made by Russell.[6] Although the evidence to support the Board's findings is not very strong, we think the case is not so weak that we can deny enforcement of the Board's order for lack of evidence.

The order for the most part was in the usual form. It directed reimbursement to Russell for any loss of pay he may have suffered during the short period in which it was found that he was discriminated against, and directed the union to withdraw its objections to his employment.[7] It required the posting of the usual notices. While the cease and desist provisions forbidding discrimination went beyond the Morrisville plant of the respondent company, we do not think that there is adequate ground for complaint on this item.

This brings us to the controversy presented by the final section of the Board's order. The Board applied what is known as the *Brown-Olds* formula for relief. It said that the hiring arrangement had the result of inevitably coercing employees not only to become

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[6] Member Bean dissented only on the question of discrimination in denying employment to Russell. He agreed with the majority that the respondents violated the Act by maintaining the unlawful hiring arrangement.

[7] The remedy derives its name from the case of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, etc. and J. S. Brown-E. F. Olds Plumbing and Heating Corp., 115 N.L.R.B. 594 (1956).

There are presently before this Court four other cases involving *Brown-Olds* remedies: NLRB v. American Dredging Co., No. 12,918 (*our petition for rehearing*); NLRB v. Local 1566, ILA, No. 12,903 (argued Nov. 16, 1959); NLRB v. Lakeland Bus Lines, Inc. and Lakeland Bus Operators Ass'n, No. 13,046 (argued Feb. 5, 1960); Paul M. O'Neill Int'l Detective Agency v. NLRB, No. 12,992 (argued Mar. 7, 1960).

members in good standing in the Respondent Union, but also to pay the Respondent Union initiation fees, dues and other sums. The payment of such moneys," continued the Board, "thus constituted the price employees had to pay for their jobs in disregard of their statutory rights."

Following this line of thought, the order provided that the respondent employer and the respondent union:

> shall jointly and severally reimburse all present and former employees, of Respondent Company, who have unlawfully been required to pay initiation fees, dues, or other money, to the Respondent Union in order to secure or retain employment with the Respondent Company under the illegal hiring arrangement between the Respondents during the period beginning 6 months before the filing and service upon the Respondents of the charges in this proceeding, in the manner set forth in the section of this Decision entitled "The Remedy."

One of the subsidiary attacks which the union makes on this order is that the Board refused to reopen the case and permit the union to offer testimony from employees that they were not coerced. Counsel for the Board, in argument here, says the reason for that refusal was that the evidence would be irrelevant. The union says that this shows that the Board's premise is that "no working man would join a labor union and pay dues to it unless he was compelled to do so by a closed shop agreement or practice." Counsel for the Board conceded that the presumption of coercion is a conclusive one once the unfair labor practice is shown.

We think it is helpful in the discussion of the question here to set aside one situation where it has been held that a broad dues-reimbursement order is proper.

Where the unfair labor practice consists of employer-domination in the creation of a union, the imposition of such reimbursement has been approved by the Supreme Court. *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533 (1943). In such a situation reimbursement is proper because the union is an illegitimate union from the beginning. Its existence is illegal. The dues themselves are the fruits of the unfair labor practice for, in the absence of the unlawful practice, there would have been no union; a fortiori, there would have been no dues paid to it. Reimbursement is simply a way of pulling the unlawful organization up by the roots. An analogous situation is the annulment of a marriage.

In a recent case,[8] the Court of Appeals for the Ninth Circuit drew a clear distinction between the situation of five young athletes who were forced to join a union and pay dues as a condition of employment and the remainder of the employees concerning whom there was no evidence of coercion. The Court permitted reimbursement of dues to the five who had been coerced; it denied it to the others.[9] In this case the court also enforced the reimbursement provision against the employer. We are not committing ourselves on this point. *Cf. Morrison-Knudsen Co.* v. *NLRB*, — F. 2d —, No. 25,613 (2d Cir. Mar. 2, 1960).

In the case before us there was no evidence that any employee was coerced. Even Russell, around whom all the controversy centered, was not coerced

[8] Morrison-Knudsen Co. v. NLRB and International Hod Carriers v. NLRB, — F. 2d —, Nos. 16,383, 16,401 (9th Cir. Feb. 19, 1960).

[9] We have already recognized that ordering a union to refund dues to those members who were actually coerced into joining or remaining in the union is an appropriate remedy. See NLRB v. Local 420, Plumbers, 239 F. 2d 327, 331 (3d Cir. 1956).

into joining the union. Rather he was dissatisfied with the way the union was being run.

In this case, too, the suggestion of the *Brown-Olds* remedy was not made in the complaint. It was not advised by the trial examiner; he, having recommended dismissal of the complaint, never reached the question of the remedy. It was not noted in General Counsel's exceptions to the trial examiner's report nor presented by the General Counsel to the Board. In other words, the imposition of the reimbursement order was the Board's own idea.

In passing on the validity of any order of the Board requiring affirmative action, we must always bear in mind two basic propositions: (1) The Board can only order such affirmative relief as will "effectuate the policies" of the Act;[10] (2) This power of the Board is remedial.

But to order a union to reimburse dues which it would have collected even if it had not committed an unfair labor practice appears to be nothing more than a fine which, in this instance, is paid into private, rather than public, coffers.

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[10] "If * * * the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall * * * issue * * * an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this subchapter* * * *." 29 U.S.C.A. § 160(c) (emphasis added).

The policies of the Act, as stated in § 1, 29 U.S.C.A. § 151, are the encouragement of "the practice and procedure of collective bargaining and * * * [the protection of] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Argument for the Board urges that the imposition of this reimbursement remedy will serve as a deterrent against unfair labor practices by both employer and union. That well may be; when one looks at the constitution of the union and sees what it costs to join it, reimbursement of dues and fees could well be a terrific deterrent if this is a union where members are frequently initiated. It appears in one of General Counsel's exhibits that the initiation fee into Local 542 is $200.00 "plus any and all fees or tax required by the Local or the International Union." Imposition of fines or jail sentences upon employers or unions who are guilty of unfair labor practices would also be a deterrent, so far as such sanctions can act as a deterrent. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties. "The Act does not prescribe penalties or fines in vindication of public rights. * * *" *Republic Steel Corp* v. *NLRB*, 311 U.S. 7, 10 (1940). "[I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Id.* at 12.[11]

The reimbursement order here was a very broad one. It was not limited to employees who had been coerced. Nor was there any coercion shown against anyone. The order was not limited to the employees at the Morrisville plant of the American Bridge Division where the alleged unfair labor practices occurred. It ran as to all members of Local 542 employed by

[11] See also Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

American Bridge, providing for reimbursement of initiation fees and dues dating back six months before the complaint was filed. The record is devoid of any information as to how many members there are in Local 542, when they joined and how many are employed at the Morrisville or other American Bridge Division plants. This shows, we think, that the reimbursement order was a shotgun blast, and not related to any aspect of this case. That is not the way equity acts in moulding relief to fit the situation before Court or Board.[12]

We think that the reimbursement order in this case is characterized the way Judge Staley characterized a similar order in *NLRB* v. *American Dredging Company*, — F. 2d — (3d Cir. Jan. 8, 1960), where he said:

> In the circumstances of this case, we cannot perceive how reimbursing employees who the evidence shows were all union members for initiation fees, dues and other monies paid to the union could in any way effectuate the policies of the Act. This case involves preferment of union members for employment, and thus it is incomprehensible to us how reimbursing them for initiation fees, dues payments, etc., paid to their union can be anything but a windfall to the employees and an unjust penalty to the employer. This was certainly no purpose of the National Labor Relations Act.

The problem of *Brown-Olds* reimbursement has occupied attention of the courts in the various circuits

[12] "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity." NLRB v. National Biscuit Co., 185 F. 2d 123, 124 (3d Cir. 1950). See also NLRB v. Globe Automatic Sprinkler Co., 199 F. 2d 64, 70 (3d Cir. 1952).

a great deal during the last few months. We recognize the eixstence of a recent view contrary to that which is expressed here in *NLRB* v. *Local 60, United Brotherhood of Carpenters*, 273 F. 2d 699 (7th Cir. 1960). But, opposed to the Seventh Circuit view, there is a growing body of authority, some of it very forcefully and clearly written, supporting our views. See *NLRB* v. *Local Union No. 85, Sheet Metal Workers*, 274 F. 2d 344 (5th Cir. 1960); *Local 357, Teamsters* v. *NLRB*, — F. 2d —, No. 14,794 (D.C. Cir. Feb. 18, 1960); *Morrison-Knudsen Co.* v. *NLRB* and *International Hod Carriers* v. *NLRB*, — F. 2d —, Nos. 16,383, 16,401 (9th Cir. Feb. 19, 1960); *Morrison-Knudsen Co.* v. *NLRB*, — F. 2d —, No. 25,613 (2d Cir. Mar. 2, 1960); *Building Material Teamsters, Local 282* v. *NLRB* and *Crawford Clothes* v. *NLRB*, — F. 2d —, Nos. 25,608, 25,614 (2d Cir. Mar. 2, 1960).

For a summary of the cases in the various Courts of Appeals involving this remedy see appendix attached hereto.

The order of the Board will be enforced but with deletion of the paragraph quoted above relating to the reimbursement order.

APPENDIX

Since the Supreme Court decision in *Virginia Electric, supra*, numerous cases have arisen in the several Courts of Appeals involving the question of the validity of a broad dues-reimbursement order in fact situations other than the type found to be present in that case. The decisions seem to be hopelessly in conflict. A court-by-court analysis indicates the following:

First Circuit—No decisions on point. *Cf. NLRB* v. *Local 404 Teamsters*, 205 F. 2d 99 (1953), enforcing a remedy providing for

dues reimbursement to 31 employees shown to have been specifically coerced.

Second Circuit—The broad remedy is specifically disapproved as applied to employers. *Morrison-Knudsen Co.* v. *NLRB*, — F. 2d —, No. 25,613 (Mar. 2, 1960). It is also disapproved against unions, although there is an intimation that it might be permissible to order a union to reimburse dues to all the employees upon a showing of actual coercion of only some. *NLRB* v. *Adhesive Products Corp.*, 258 F. 2d 403 (1958); *Building Material Teamsters, Local 282* v. *NLRB* and *Crawford Clothes, Inc.* v. *NLRB*, — F. 2d —, Nos. 25,608, 25,614 (Mar. 2, 1960).

Third Circuit—No decisions on point prior to *American Dredging* and the instant case. *Cf. NLRB* v. *Local 420, Plumbers*, 239 F. 2d 327 (1956), enforcing an order providing for reimbursement of "permit" fees to certain individuals shown to have been specifically coerced. In *NLRB* v. *Spicuak*, 179 F. 2d 695 (1950), a *Brown-Olds* order was approved, but the point was not argued by counsel. In this case a company-assisted union was involved together with a closed shop agreement.

Fourth Circuit—No decisions on point. *Cf. Virginia Electric & Power Co.* v. *NLRB*, 132 F. 2d 390 (1942), *aff'd* 319 U.S. 533 (1943). The Supreme Court opinion in this case is the starting point in the analysis here. See also *NLRB* v. *Baltimore Transit Co.*, 140 F. 2d 51, *cert. denied* 321 U.S. 795 (1944), enforcing the broad remedy in a *Virginia Electric* type situation.

Fifth Circuit—Dictum in *NLRB* v. *McGough Bakeries Corp.*, 153 F. 2d 420, 425 (1946), indicated apparent disapproval of the broad reimbursement order. However, in later cases the court sustained the remedy, *NLRB* v. *Parker Bros.*, 209 F. 2d 278 (1954), *Dixie*

Bedding Co. v. *NLRB*, 268 F. 2d 901 (1959), although it refused to enforce it in a case where there was no closed shop contract and most of the members of the union testified that they had joined voluntarily and had not been coerced. *NLRB* v. *Braswell Motor Freight Lines*, 209 F. 2d 622, *as modified* 213 F. 2d 208 (1954). However, in *NLRB* v. *Local No. 85, Sheet Metal Workers*, 274 F. 2d 344 (1960), the court disapproved of the broad dues-reimbursement remedy, "in the absence of some proof that dues would not have been paid but for the requirement" of union membership as a condition of employment. *McGough Bakeries*, *Parker Bros.*, *Dixie Bedding*, and *Braswell Motor* all involved orders directed at the employer only. In *Local No. 85*, the order was directed against the union only.

Sixth Circuit—No decisions on point.

Seventh Circuit—The court refused to enforce the broad dues-reimbursement remedy (directed at the employer only) in a situation where, although there was employer sponsorship and support of the union, there was no closed or union shop and non-union workers were not discriminated against. *NLRB* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 463 (1954). However, it upheld a broad dues-reimbursement remedy directed at the union only where there was an illegal closed shop arrangement. *NLRB* v. *Local 60, Carpenters*, 273 F. 2d 699 (1960). Apparently the Board in the latter case did not argue in terms of a "conclusive presumption" as it does here, for the court talks about the burden of proof being on the union to show that the employees would have remained in the union even without the unlawful discrimination. 273 F. 2d at 703.

Eighth Circuit—No decisions on point. *Cf. Donnelly Garment Co.* v. *NLRB*, 165 F. 2d

940 (1948), enforcing the broad remedy in a *Virginia Electric* type situation.

Ninth Circuit—The broad dues-reimbursement remedy is specifically disapproved as against both union and employer. *Morrison-Knudsen Co.* v. *NLRB* and *International Hod Carriers* v. *NLRB*, — F. 2d —, Nos. 16,383, 16,401 (Feb. 19, 1960).

Tenth Circuit—The broad dues-reimbursement remedy is specifically approved as against both union and employer. *NLRB* v. *Broderick Wood Products Co.*, 261 F. 2d 548 (1958); *NLRB* v. *General Drivers Local No. 886*, 264 F. 2d 21 (1959).

District of Columbia Circuit—In *Local Lodge No. 1424, IAM* v. *NLRB*, 264 F. 2d 575, *cert. granted* 360 U.S. 916 (1959), the court specifically approved of the broad remedy as against both union and employer. However, in *Local 357, Teamsters* v. *NLRB*, — F. 2d —, No. 14,794 (Feb. 18, 1960), a different panel, in a per curiam opinion, specifically disapproved of the broad remedy where it was directed against the union only.

The eleven cases decided prior to *Virginia Electric* are listed in a footnote to that opinion. 319 U.S. at 534 n. 1.

BIGGS, *Chief Judge*, concurring in part and dissenting in part.

The facts in this case as developed by the Board and by the majority opinion, demonstrate circumstances under which preferential hiring of union employees could be and probably was effected by the Union and the Company. But the record is devoid of evidence which shows that such preferential hiring did take place. The Board and this court have substituted a plausible assumption for proof of preferential hiring. It is not sufficient to prove, as the Board has done here, that a facile arrangement existed

whereby the Union and the Company could have effected preferential hiring of the Union's members. For this reason I dissent from that portion of the majority opinion which supports the Board's order respecting the alleged preferential hiring. But had preferential hiring been proved I would concur in the majority view as to the application of the "Brown-Olds" remedy.

I agree with the majority's conclusions as to the relief to be granted to Russell.

A True Copy:

Teste.

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,011

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1960

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

SUPPLEMENTAL OPINION OF THE COURT

(Filed May 17, 1960)

PER CURIAM.

The National Labor Relations Board has submitted a form of decree carrying out this Court's decision in the above entitled case in which the opinion was filed on April 13, 1960. Since our opinion was filed the United States Supreme Court has entered its decision in the case of *Communications Workers of America* v. *NLRB*, — U.S. — (May 2, 1960). In that decision the Supreme Court held that it was proper to eliminate from a decree enforcing a Board order against a union broad terms like "in any manner" and "or any other employer" when the complaint was directed against the union's conduct with respect to one employer and one type of unfair labor practice.

We think the objection of both union and employer to the decree submitted by the Board is well taken in view of this Supreme Court decision. The decree as entered will delete from both the required notice and the order the terms "or any other employer over whom the Board will assert jurisdiction," "or any other labor organization," "or any other employee or applicant for employment," "or by discriminating in any other manner in respect to the hire or tenure of employment, or any term or condition of employment."

The sections of the decree affected by this opinion are as follows: I(a)(1), I(a)(2), I(a)(3), II(a)(1), II(a)(2), and II(a)(3). Also affected are paragraphs (2) and (3) of the Notice required to be posted by the employer and paragraphs (1) and (2) of the Notice required to be posted by the union.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, RESPONDENTS

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated February 9, 1959. The Court heard argument of respective counsel on March 8, 1960, and has considered the briefs and transcript of record filed in this cause. On April 13, 1960, the Court, being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said Order. In conformity therewith, it is hereby

I. Ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that Respondent, United States Steel Corporation (American Bridge Division), its officers, agents, successors, and assigns shall:

(a) Cease and desist from:

(1) Entering into, performing, maintaining, or giving effect to any agreement, arrangement, or understanding with Local Union 542, International Union of Operating Engineers, AFL–CIO, which conditions the hiring of applicants for employment, or

the retention of employees in their jobs, upon clearance or approval by, or upon membership in, such labor organization, except as authorized by Section 8(a)(3) of the Act;

(2) Encouraging membership in Local Union 542, International Union of Operating Engineers, AFL-CIO, by granting preference in hiring to its members, except as permitted by Section 8(a)(3) of the Act.

(3) Discriminating against James Russell by refusing to hire him without approval of the above-named Union, except to the extent permitted by Section 8(a)(3) of the Act;

(4) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(2) Post at its offices and job sites within the territorial jurisdiction of Respondent Local Union 542, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Fourth Region, (Philadelphia, Pennsylvania) shall, after having been duly signed by Respondent's representative, be posted by

it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees or job applicants are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(3) Post at the same places and under the same conditions as set forth in (2) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Union's Notice herein marked "Appendix B";

(4) Mail to the aforesaid Regional Director signed copies of the notice attached hereto marked "Appendix A" for posting by Respondent Local Union 542, at its offices, hiring halls, and meeting halls in places where notices to members and to other persons using Local Union's 542's hiring hall are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by a representative of the Respondent Company, be forthwith returned to the aforesaid Regional Director for such posting;

(5) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree as to what steps the Respondent Company has taken to comply herewith.

II. It is further ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that Respondent Local Union 542, International Union of Operating Engineers, AFL–CIO, its officers, representatives, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Entering into, performing, maintaining, or otherwise giving effect to any agreement, arrangement, or understanding with the Respondent United

States Steel Corporation (American Bridge Division), which conditions the hiring of applicants for employment or the retention of employees in their jobs, with such employer upon clearance or approval by the said Respondent Union, or which conditions employment upon membership in the Respondent Union, except as authorized by Section 8(a)(3) of the Act;

(2) Causing or attempting to cause the Respondent Company to discriminate against James Russell, in violation of Section 8(a)(3) of the Act;

(3) In any like or related manner restraining or coercing employees or prospective employees of Respondent Company in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Preserve and make available to the Board or its agents upon request, for examination and copying, all records, reports, and other documents, necessary to analyze the amounts of moneys due under the terms of this Order;

(2) Notify in writing Respondent Company and James Russell that the Respondent Union has withdrawn its objections to the hiring or continued employment of Russell by Respondent Company, or to his employment by any other employer;

(3) Post in the Respondent Union's business offices, hiring halls, and meeting halls copies of the notice attached hereto as "Appendix B." Copies of said notice, to be furnished by the aforesaid Regional

Director shall, after being duly signed by an authorized representative of the Respondent Union, be posted by the said Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days in conspicuous places, including all places where notices to members and to other persons using respondent Union's hiring hall are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced, or covered by any other material;

(4) Post at the same places and under the same conditions as set forth in (3) above, as soon as they are forwarded by the said Regional Director, copies of the Respondent Company's Notice herein marked "Appendix A";

(5) Mail to the aforesaid Regional Director signed copies of the notice attached hereto marked "Appendix B" for posting by Respondent United States Steel Corporation (American Bridge Division), at its offices and job sites within the territorial jurisdiction of Respondent Union, including all places where notices to employees or job applicants are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being duly signed by a representative of Respondent Union, be forthwith returned to the aforesaid Regional Director for such posting;

(6) Notify the said Regional Director in writing within ten (10) days from the date of this Decree as to what steps the Respondent has taken to comply herewith.

III. The Respondent, United States Steel Corporation (American Bridge Division), its officers, agents, successors, and assigns and the Respondent, Local Union 542, International Union of Operating Engineers, AFL–CIO, its officers, representatives, agents,

and assigns, shall jointly and severally make whole James Russell for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of the Board's Decision entitled "The Remedy."

BY THE COURT:

GOODRICH,
Circuit Judge.

Dated: May 17, 1960

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECREE

of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT enter into, perform, maintain or otherwise give effect to any agreement, arrangement, or understanding with LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, requiring membership in, or clearance by, said labor organization as a condition of employment, except as authorized by Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT encourage membership in LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, or any other labor organization, by refusing to hire James Russell, or any other applicant for employment, or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized by Section 8(a)(3) of the act.

WE WILL NOT discriminate against James Russell or any other applicant for employment by refusing to hire him without approval of the above-named union, except as permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such

rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL make James Russell whole for any loss of pay suffered as a result of the discrimination against him.

UNITED STATES STEEL CORPORATION
(AMERICAN BRIDGE DIVISION)

(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced or covered by any other material.

APPENDIX B

NOTICE

TO ALL MEMBERS OF LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; TO ALL EMPLOYEES OF UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION); TO ALL EMPLOYEES WHO WORK, OR WISH TO WORK WITHIN THE JURISDICTION OF OPERATING ENGINEERS, AND TO ALL APPLICANTS FOR EMPLOYMENT

PURSUANT TO A DECREE

of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT enter into, perform, maintain or otherwise give effect to any agreement, arrangement, understanding, or practice with UNITED STATES STEEL CORPORATION (AMERICAN

BRIDGE DIVISION), which conditions the hiring of applicants for employment, or the retention of employment in their jobs, with such employer upon clearance or approval by us, or which conditions employment upon membership in our organization, except as authorized by Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), against James Russell, in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL make James Russell whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL notify, in writing, UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), that we have no objection to the hiring or employment of James Russell.

WE WILL notify, in writing, James Russell, that we have withdrawn our objection to the hiring or continued employment of him by UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), or to his employment by any other employer.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO_____
(Labor Organization)

Dated_____ By _____
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date of this posting and must not be altered, defaced or covered by any other material.

U.S. GOVERNMENT PRINTING OFFICE: 1980